IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1636

DAVID UNGAR, et al.
and
JOHN RADER, et al.,

Petitioners,

v

DUNKIN' DONUTS OF AMERICA, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

DAVID BERGER,
WARREN D. MULLOY,
WARREN RUBIN,
DAVID BERGER, P. A.,
1622 Locust Street,
Philadelphia, Pa. 19103
and
JAMES M. MARSH,
EDWARD C. GERMAN,
JOSEPH G. MANTA,
LABRUM & DOAK,
1500 Seven Penn Center,
Philadelphia, Pa. 19103
and
HAROLD BROWN,
BROWN, LEIGHTON & COHEN,
66 Long Wharf,
Boston, Mass. 02110
Attorneys for Petitioners.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS.

TABLE OF CITATIONS.

TABLE OF CITATIONS (Continued).

TABLE OF CITATIONS (Continued).

Cases (Continued): Page

Authorities:

Rules:

Statutes:

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Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this action on March 3, 1976.

OPINIONS AND ORDERS BELOW.

The opinion of the District Court dated March 12, 1975 when it granted class certification to certain issues is reported at 68 F. R. D. 65 (E. D. Pa. 1975); 1975-1 Trade Cases ¶ 60,204 (E. D. Pa. 1975) and appears in Appendix A. The opinion of the District Court dated April 8, 1975 certifying its class action opinion for inter-

locutory appeal, pursuant to 28 U. S. C. § 1292(b), is reported at 1975-1 Trade Cases ¶ 60,361 (E. D. Pa. 1975); it appears in Appendix B. The order of the Court of Appeals dated May 7, 1975 accepting the interlocutory appeal, pursuant to 28 U. S. C. § 1292(b), is not reported; it appears in Appendix C. The opinion of the Court of Appeals dated March 3, 1976 reversing, in part, the class certification of the District Court is reported at 1976-1 Trade Cases ¶ 60,763 (3d Cir. 1976); it appears in Appendix D. The order of the Court of Appeals dated April 5, 1976 denying appellees' (petitioners) petition for rehearing in banc is not reported; it appears in Appendix E. The order of the Court of Appeals dated April 14, 1976 staying the mandate, pursuant to Rule 41(b) of F. R. A. P., is not reported; it appears in Appendix F.

JURISDICTION.

The final judgment of the Court of Appeals was entered on March 3, 1976. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Is not the private enforcement of the antitrust laws effectively threatened by the Court of Appeals holding that, in order to establish per se illegal tying arrangement under Section 1 of the Sherman Act, 15 U. S. C. § 1, a plaintiff must not only prove the tie-in requirements as defined by this Court in *Northern Pacific Railway v. United States,* 356 U. S. 1 (1956), to wit that:

> (1) defendant had a resolutely enforced company-wide policy to grant its franchise "*but only on the condition* that the buyer also purchases a different product" from defendant and its designated supplier, and
>
> (2) the franchisor "has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product" and
>
> (3) "a 'not insubstantial' amount of interstate commerce is affected",

but, *in addition,* must also affirmatively prove a separate and distinct element termed "individual coercion"? [1]

STATUTE AND RULE INVOLVED.

The applicable statute is Section 1 of the Sherman Act, 15 U. S. C. § 1. It provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

Rule 23 of the Federal Rules of Civil Procedure is the applicable rule, 28 U. S. C. Rule 23. It provides in pertinent part:

> "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the

1. While this case comes before the Court in the context of a decision on the certification of a class, both the District Court and the Court of Appeals recognized that the controlling issue was one of the substantive law of tie-ins. If there is no requirement that a plaintiff allege and prove this separate element called "individual coercion", it is clear that the District Court's certification of the tie-in class was correct and should have been affirmed by the Court of Appeals.

class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

STATEMENT OF THE CASE.

Plaintiffs (petitioners herein) instituted separate (now consolidated) actions in 1972 charging defendants (respondents herein) with, *inter alia,* violation of Section 1 of the Sherman Act, specifically that respondents had a policy of granting the license to use its trademark only on the condition that each licensee also agree to lease real estate and purchase equipment and signs solely from the defendants and purchase all supplies solely from defendants' authorized suppliers (A5). Prior to November 1970, this company policy was expressly set forth in respondents' standard form contract documents. Effective the beginning of the fiscal year immediately following the decision in *Chicken Delight Inc. v. Harris,* 412 F. 2d 830 (9th Cir. 1969), the tying language was removed from the standard form documents (A6), but the respondents' policy on the tie-in did not change.

Petitioners brought the actions individually and on behalf of all other current and former franchisees of the respondents. In their motion for class action determination pursuant to Federal Rule of Civil Procedure 23(c)(4), plaintiffs sought class certification for the following claims: the equipment tie-in, the sign tie-in, the real estate tie-in, the supplier tie-in, advertising, real estate tax escrow, restrictive covenant and common law fraud claims.

The District Court decided that before it could decide the class action petition, it had to first determine whether the petitioners, in order to establish an illegal tie-in, must prove a separate and distinct element called "individual coercion". If there were such a requirement, individual issues would predominate and a class action would be inappropriate. If there were no such requirement, class action certification would be appropriate.

The District Court noted that the plaintiffs conceded that they must prove that the defendants *used the requisite economic power to condition* the sale of one product on the purchase of a second and distinct product [2] (A8, 45). Plaintiffs contended, however, that there was no additional requirement that they prove a separate and distinct element termed by the defendants "individual coercion" (A8-9). Defendants, on the other hand, contended that "individual coercion" was a separate and distinct element

2. The Circuit Court of Appeals stated plaintiffs' contention as follows: ". . . that Dunkin' Donuts had a policy of granting a license to use its trademark *only on the condition* that the licensee accept certain other items from Dunkin' Donuts, . . ." (A185). (emphasis added)

of a tie-in which must be affirmatively proved by the plaintiffs (A8, 47).

The District Court first attempted to arrive at a definition of the term "individual coercion". It realized the semantic overtones of the problem and observed that "It is possible that by means of an linquistic phenomena alone, 'coercion' may have assumed an independent viability in the law" (A49). The District Court noted that "coercion" was a "chameleon hued word" and had been used differently in different cases, sometimes merely to connote the use of economic power or influence and "sometimes in the strict sense posited by the defendant" (A80). As a basis for its analysis, the District Court accepted defendants' definition of what it meant by "individual coercion". After discussing various definitions of coercion, the District Court noted:

> "Dunkin' Donuts opts for a construction in the harshest light to plaintiff i.e. to bar each plaintiff from a cause of action unless each can show that he bargained to reject each specific tied product and capitulated by taking each tied product due to improper economic pressure." (A74).[3]

It was this definition of "individual coercion" that the District Court, after careful analysis, was to reject as the *sole* method of establishing an illegal tie-in, and it was this definition of "individual coercion" that the Court

3. In its brief to the Court of Appeals, the defendants attempted to retreat from this untenable position by saying that "conditioning might be a better generic term" and can be "substituted for the words 'coerce' or 'coercion'." (Def. Brief p. 18). This is not mere semantics, it is a 180° turn about by defendants. The District Court in no way rejected a requirement of "conditioning" or "use of economic power" (A45). Rather, what the Court rejected was defendants' untenable contention that franchisee-by-franchisee proof of "individual coercion" as defined by the defendants, was a separate and distinct element of an illegal tie-in which each plaintiff must affirmatively prove.

of Appeals held must be affirmatively proven by a plaintiff in order to establish an illegal tie-in.

In analyzing the issue, the District Court recognized and accepted the requirement of a tie-in *condition.* The District Court noted that: ". . . a tie-in cannot exist unless the availability of the tying product *is conditioned* on the purchase of the tied product." (A45)[4] (emphasis added). Likewise, it recognized that the requisite economic power must not merely exist, it must be used in support of the condition (A8). The issue to be decided, the District Court noted, was whether the plaintiffs also had the obligation of going further and proving "individual coercion" as defined by the defendants, i.e. of proving that each franchisee "after negotiating on the point, was coerced" into acting against his will and accepting the tie-in (A47).

The District Court noted that illegal tie-ins deprive a buyer of the free choice to select a product on its merits. However, the District Court recognized that this Court's "principal concern seems to be the foreclosure of competition in the tied product." (A25). Thus, the Court stated that its analysis could not be limited to a focus upon whether the individual plaintiffs have been injured but must be heavily concentrated "on the economic injury brought upon competitors in the tied product and hence upon the market place and the economy as a whole." (A27). See also Turner, *The Validity of Tying Arrangements Under the Anti-Trust Laws,* 72 Harv. 50, 60-61 (1958).

The District Court noted that this Court has not set forth a coercion requirement in tying cases and that "the

4. The District Court also noted: "To succeed in a claim of unlawful tying, the plaintiff must prove that the tying product was unavailable without the tied product. What is at issue here is the question of proof." (A45, fn. 31).

law comprehends tying suits by foreclosed competitors in which a question of coercion of franchisees seems peripheral at best." (A46). The District Court sagely observed that the dispute may well resolve into a dispute, not over the requisites of a tie, but over the appropriate means of proving use of economic power (A49).

After an exhaustive study and analysis of the law, the District Court determined that:

> "[P]roof of individual coercion is but *one of several* means of establishing the use of economic power or leverage.
>
> * * *
>
> We thus resolved the use-coercion dialogue by rejecting the doctrine that 'individual coercion' must be proved in order to establish an unlawful tie." (A80-82) (emphasis added).

The District Court then went on to make the following corollary determinations:

> 1. Use of economic power can be established by evidence of a firm and resolutely enforced policy to condition the sale of the franchise upon the agreement by the franchisee to purchase or lease equipment, real estate, supplies and signs from the defendants (A81).
>
> 2. Use of economic power is inferrable from the acceptance by a large number of buyers of a burdensome or uneconomic tie. At least such evidence would be probative on the issue (A81-82).
>
> 3. A tie-in condition appearing in the express terms of a written contract can show the use of economic power (A79).

> 4. Individual coercion, as defined by the defendants, can also be used to show use of economic power (A79-80).

The District Court noted that it has not presented "a formulation with the precision of a jury charge. Nor have we attempted to posit the quantum of evidence required before the case can go to the jury." (A82-83). What the District Court did was to review the elements that the plaintiffs must establish in order to prove an per se illegal tie-in and from that determine whether they could be proved on a class basis. On the basis of its rejection of defendants' position as to "individual coercion", the District Court certified a tie-in class, *inter alia*, with respect to equipment, signs, real estate and supplies.[5]

The Court of Appeals reversed the District Court and ruled that, in addition to the elements of a tie-in accepted by the District Court, the plaintiffs must also affirmatively prove a separate and distinct element called "individual coercion" in order to establish an per se illegal tie-in.[6] The Court of Appeals found that this Court in its tie-in opinions has set forth a coercion requirement. In reaching this determination, the Court of Appeals referred to certain language in opinions of this Court respecting "leverage", "force", etc. (A192-193). Nowhere does the Court of Appeals refer to any language of any opinion which states

5. The District Court also certified a class with respect to the contractual claims concerning the advertising fund and the antitrust claims concerning the in-term restrictive covenant (A150).

6. The Court of Appeals stated that "coercion" is the relevant term in the context of substantive law and that "individual coercion" is the relevant term in the context of a class action (A193). However, the Court of Appeals nowhere defined "coercion". Since it reversed the District Court on the point, it must be assumed that it was using the same definition as was used by the District Court, i.e. defendants' definition of "individual coercion" (See *supra* p. 6).

that "leverage", "force", etc., are separate and distinct elements which must affirmatively be proven. Moreover, the Court of Appeals apparently did not realize that the leverage or force referred to in opinions of this Court is always referred to as a *by-product* or *result* of the *use* of *economic power to condition* the sale on one product on the purchase of another product. Indeed, all this Court indicated was that a restraint of trade results from an illegal tie-in. This is the exact reason why tie-ins have fared so badly before this Court.

After determining that a plaintiff must prove a separate and independent element termed "coercion" the Court of Appeals went on to determine that this element must be established on an individual basis, i.e. each franchisee must prove it tried to negotiate out of the tie-in but failed. It ruled that proof of acceptance of a burdensome or uneconomic tie-in by a large number of franchisees could not alone establish *prima facie* proof of "the coercive element of an illegal tie-in claim." The Court of Appeals apparently was moved by a concern about the effect of class actions on franchisors (A199).

Finally, the Court of Appeals refused to face up to the question concerning the effect of a "coercion" requirement on a suit by a competitor of the "tier". The Court noted, in footnote 7(a) (A197) that "We express no opinion as to what kind of proof ought to be required of a plaintiff's supplier alleging injury to his business from the tie-in." Thus, the Court of Appeals has obliquely hinted that there may be two separate types of tie-ins with "coercion" an affirmative element of one of the actions but perhaps not of the other. Needless to say, it cited no authority for this proposition.

REASONS FOR GRANTING THE WRIT.

A. The Decision of the Court of Appeals Is Contrary to the Applicable Decisions of This Court Which Have Never Set Out Coercion as a Separate and Independent Element of an Illegal Tie-in and Which in Fact, Preclude Such an Element.

The Court of Appeals based its decision, in part, on its own interpretation of language in tie-in opinions of this Court which contained words such as "force", "leverage", etc. What the Court of Appeals ignored, however, is that these words were never stated by this Court to be *separate elements* of an illegal tie-in; they were always used to describe the *effect* or *by-products* of an illegal tie-in. Thus, the Court of Appeals took a description of the *effect* of *some* illegal tie-ins and placed upon plaintiffs the burden of affirmatively proving this as a separate and distinct *element* of a tie-in in all cases.[7]

It is significant that there is not a single opinion of this Court which states that, in order to establish an illegal tie-in, a plaintiff must prove a separate and distinct element called "coercion". It would have been simple enough to include this element in the definition of or listing of the elements of a tie-in. The fact that it has never been done by this Court is indeed significant. A review of the significant tying decisions of this Court amply demonstrates that the Court of Appeals decision was incorrect.

In *United Shoe Manufacturing Corp. v. United States,* 258 U. S. 451 (1922), this Court held that United Shoe's practice of requiring lessees of its patented shoe manufacturing equipment to purchase other machinery and inci-

7. It is not without significance that when listing the elements of a tie-in that a plaintiff must prove, the Court of Appeals did not include "coercion" (A203). Since all of these elements can be proven on a class basis (see *infra* p. 26), the decision of the Court of Appeals becomes inherently inconsistent.

dental supplies only from United Shoe violated Section 3 of the Clayton Act.[8] There was no evidence of any "coercion", merely the discussion of the tie-in condition.[9] Significantly, the Court noted that an illegal tie-in occurs even though the condition is "not enforced" (Id. at 458).

The next significant tie-in case was *International Salt Co. v. United States,* 332 U. S. 392 (1947). Once again the Court noted that an illegal tie-in could exist even though the tie-in condition was not always enforced (Id. at 398) and once again there was no evidence of any "coercion"; there was merely the condition on the lessee to use the salt products of the lessor of the machine.

It is significant that in arguing for certain terms in the decree, the government successfully sought to prevent International Salt from effectuating the tie-in by a "more favorable treatment of a customer who buys its salt." (Id. at 403). Thus, not only was there no individual coercion as defined by the defendants herein, but the case makes it quite clear that a tie-in can be effectuated, not solely by coercion, but also by a "more favorable treatment of a customer" to induce it to buy both products. Accord. *Fortner Enterprises, Inc. v. United States Steel,* 394 U. S. 495 (1969).

The next tie-in case in this Court was *Times-Picayune Publishing Company, et al. v. United States,* 345 U. S. 594 (1953) where this Court stated, *inter alia,* that: *"By conditioning* his sale of one commodity on the purchase of another, *a seller coerces* the abdication of buyer's independent judgment as to the 'tied' product's merits. . . ." Id. at 605. Clearly, the "conditioning" is the essential *element* while the loss of the buyer's "independent judgment", is the *result*—"By *conditioning* . . . a seller coerces

8. Section 3 of the Clayton Act has the same elements as Section 1 of the Sherman Act for the present purposes.

9. Petitioners and the District Court always recognized the requirement of proving the "tie-in" condition (See *supra* pp. 7 & 9).

. . ." If indeed coercion is a necessary part of a tie-in, it is necessarily present when the other elements, all of which can be proved on a class basis, are present and there is no "coercive" requirement beyond proof of the tie-in "condition".

In this case the District Court always recognized that plaintiffs must prove that defendants *conditioned* the sale of one product on the purchase of a second product. Indeed, the Court found that this condition appeared in defendants' standard contract documents until November, 1970 and that thereafter there was still a "resolutely enforced" company-wide policy to condition the grant of its franchise on the agreement by the franchisee to purchase other products from the defendant.[10]

In the leading case of *Northern Pacific Railway Co. v. United States,* 356 U. S. 1 (1958), this Court defined a tying arrangement as —"an *agreement* by a party to sell one product but on the *condition* that the buyer also purchases a different (or tied) product or at least *agrees* that he will not purchase that product from any other suppliers." (Id. at 5-6) (emphasis added). Again, it can be seen that coercion is nowhere mentioned in the definition and is, thus, not one of the essential separate elements of a tie-in. If "coercion" were a necessary separate element of a tie-in, it would have clearly appeared in the definition.

These "tie-in agreements" are per se violations whenever a party has the requisite economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial amount of interstate commerce is effected." (Id.

10. For example, the defendants purchased the complete equipment package from only one source, Paramount Fountain & Restaurant Supply Company, and in turn had the equipment package shipped directly to the franchisees at an increased cost of $7,000 to $22,000 to the franchisees (A12, 101-102).

at 6). This Court then went on to explain that the reason for the control or dominance requirement is that it leaves the buyer with no reasonable means of obtaining the tying product without accepting the condition of the seller, i.e. the purchase of the tied product (Id. at 6-7). Thus, it is the use of this economic power which results in the condition becoming a restraint on trade (Id. at 6-7). This is exactly what the District Court held in this case. The Court of Appeals, however, ignored this aspect, but instead added an additional element of individual coercion.

It is significant that there is no mention of any evidence of "coercion" in the *Northern Pacific* case; there is a discussion of the tie-in condition. The defendant in the *Northern Pacific* case contended that the "preferential routing" clauses were not always enforced and that in any event, they allowed the lessee to ship by a competing carrier if its rates were lower or its service better than the defendant, i.e. the buyer loses nothing. In rejecting this contention, this Court noted:

> "Of course if these restrictive provisions are merely harmless seives with no tendancy to restrain competition, as the defendant's argument seems to imply, it is hard to understand why it has expended so much effort in obtaining them in vast numbers and upholding their validity, or how they are of any benefit to anyone, even the defendant. But, however may be, the essential fact remains that these agreements are binding obligations held over the heads of vendees *which deny defendant's competitors access to the fenced off market on the same terms as the defendant.*" (Id. at 11) (emphasis added).

Thus, the Court notes that even though the condition is not onerous or coercive to the customer, it does restrain competition by denying defendant's competitors access

"to the fenced off market on the same terms as the defendant". Under the rule of the Court of Appeals, a supplier would not have a cause of action where there is no actual overcoming of the will of each buyer by improper pressure from the seller, even though there is in fact a restraint of trade. While the Appellate Court indicates somewhat obliquely that perhaps coercion may not be necessary in a suit by a competitor, there is no support anywhere for the proposition that elements of the tie-in are different depending on whether or not the suit is by a customer or by a competitor. See *Fortner v. United States Steel, infra.*

The case of *United States v. Loew's, Inc.*, 371 U. S. 38 (1962) continued the trend of easing the requirement of the amount of economic power necessary to constitute a per se illegal tie-in agreement. The Court held that the ". . . crucial economic power may be inferred from the tying products' desirability to consumers or from the uniqueness in its attributes. The requisite economic power is presumed when the tying product is patented or copyrighted. . . ." (Id. at 45). Thus, again the Court notes that not coercion but "desirability" or "uniqueness" of the tying product may constitute an important part of a tie-in.[11]

In none of these cases is there any requirement that the purchaser must affirmatively attempt to negotiate out of the tie-in. No where is there any indication that there must be an investigation to determine whether the buyer is less than willing to enter into the tie-in; indeed this Court speaks of a tie-in as an "agreement".

11. The "uniqueness" in the present case is, of course, supplied by defendants' trademark and license agreement. See *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F. 2d 1002 (5th Cir. 1972), cert. denied, 409 U. S. 1086; *Siegel, supra; Aamco v. Tayloe*, 1976 Trade Cases ¶ 60,666 (E. D. Pa. 1976); *Hawkins v. Holiday Inns, Inc.*, 1975 Trade Cases ¶ 60,153 (W. D. Tenn. 1975).

The District Court in *Loew's* looked into the circumstances concerning the various negotiations, but, as the Supreme Court noted: "Since defendant C. & C. was found to have had an overall policy of block booking, the Court did not analyze the particular circumstances of the negotiations which had resulted in the licensing the packages of films." (Id. at 43). In the instant case the District Court found that the plaintiffs had established *prima facie* evidence that the defendants had an overall company policy to condition the grant of a franchise upon the agreement by the customer to purchase or lease equipment, signs, real estate and supplies from the defendants or it authorized suppliers. Indeed the Court of Appeals in this case noted that: "[A]ppellees emphasized that the focus of their case was not individual instances of illegal conduct, but a pervasive company policy, 'firm and resolutely enforced', to tie the real estate, equipment, signs and supplies to the trademark license." (A187). An individual inquiry into the circumstances of each particular negotiation is thus not necessary and a class certification is appropriate.

The most recent Supreme Court decision involving illegal tie-ins is *Fortner Enterprises, Inc. v. United States Steel Corporation,* 394 U. S. 495 (1969). The plaintiff charged that a per se violation of the Sherman Act occurred because of tying arrangements whereby loans by the subsidiary of the defendant to the plaintiff, for the purchase and development of land, were conditioned upon plaintiff's agreeing to erect prefabricated houses manufactured by the parent on each of the lots purchased with the loan proceeds.

As to the question of the amount of commerce effected, the Court stated: ". . . normally the controlling consideration is simply whether a total amount of business, substantial enough in dollar-volume so as not to be merely *de minimus,* is foreclosed to competitors by the tie, . . ." (Id. at 501). Thus this Court had foremost in mind the *effect the agreement had on competitors of the defendant.*

The Court recognized the lessening of the requirement of economic power and gave the reason for that as follows:

> "These decisions rejecting the need for proof of truly dominant power over the trying product have all been based on a recognition that because tying arrangements generally serve no legitimate purpose that cannot be achieved in some less restrictive way, the *presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie.* Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market." 349 U. S. at 503 (emphasis added).

The Court noted therefore that the "proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable amount of buyers within the market". (Id. at 504). The Court went on to note that the competitors of United States Steel sold prefabricated houses and built conventional homes for at least $400 less than United States Steel price for comparable models. The Court noted:

> "Since in a freely competitive situation, buyers would not accept a tying arrangement obligating them to buy a tied product at a price higher than the going market rate, this substantial price differential with respect to the tied product (prefabricated houses)

in itself may suggest that respondents had some special economic power [i.e. coercion] in the credit market." 349 U. S. at 504 (emphasis added).

In the present case, the plaintiffs produced evidence that virtually 100% of the Dunkin' Donuts' franchisees purchased the equipment from Dunkin' Donuts' designated supplier even though the price of the equipment cost $7,000 to $20,000 more than they could have bought it directly from defendants' only supplier or another equipment supplier (A102). This indeed suggests that this was not "a freely competitive situation" and that there was "some special economic power" on the part of Dunkin' Donuts. As the District Court determined, there was *prima facie* evidence of ". . . an inherently coercive marketing system. . . ." (A68).

This Court in *Fortner* noted that the ability to give unusually advantageous terms can also reflect a creditor's unique economic advantage over its competitors. Thus, these unusually favorable terms for the tying product, hardly coercive, can induce an illegal tie-in. Perhaps the most significant language for our purpose is in the dissent by Mr. Justice White. Mr. Justice White states: "[E]ven if the customer is *indifferent* among brands of the second product and *therefore loses nothing by agreeing* to use the seller's brand of the second in order to get his brand of the first, such tying agreements may work significant restraints on competition in the tied product." 349 U. S. at 512-513 (emphasis added). Thus, even though the seller has no real interest in whether he gets the tied product of the seller and thus, could not possibly be "coerced", the mere condition is sufficient to create a tying situation, *because of the impact upon the seller's competitors.*

Thus, it can be seen from a review of the cases that:

1. In *no case* was it held that a plaintiff must prove a separate element called "*coercion*".[12]

2. Factually, there was no evidence in any case of the separate element called "*coercion*"; there was merely the presence of tie-in "*condition*" and the use of "*economic power*".

3. A prime concern in a tying situation is that competition in the tied product is restrained.

4. Because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of *any* appreciable restraint on competition provides a sufficient reason for invalidating the tie.

5. The fact that a customer would pay more for a tied product is, *in itself*, evidence that there was not a "freely competitive situation" and that the seller had special economic power concerning the tying product.

Moreover, there is no sound antitrust policy for any requirement that a plaintiff be required to affirmatively prove a separate and distinct element called "coercion".

1. To require such proof would virtually eliminate the right of a competitor of the tie-in seller from bringing suit to enjoin the tie-in or recover damages for a "consensual" tie-in between the competing seller and that seller's customers.

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12. Indeed, Mr. Justice White, in a concurring opinion, in *Perma Life Mufflers, Inc. v. International Parts Co.*, 392 U. S. 134, 145 (1968), stated:

> "When those with market power and leverage persuade, coerce, *or* influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of § 4, since it will deter those most likely to be responsible for organizing forbidden schemes." (Emphasis added)

2. The elements commonly said to constitute a per se illegal tie-in are economically sound and sufficient. These elements—conditioning, use of economic power and impact on interstate commerce—are broad enough to subsume "coercion" no matter how defined or subtly wielded.

3. The word "coercion" has no gloss insofar as tie-in law is concerned. Depending on how it is defined, it may necessarily be present whenever an inequality of bargaining power is present. Moreover, whatever "coercion" may be necessary, if any, is automatically and necessarily present when the standard elements are present.

4. Use of the "coercion" concept changes the focus of tie-ins from their effect on the market place to the state of mind of the purchaser. It completely negates the primary concern involving tie-ins—the effect on competitors of the seller.

5. The only real purpose that "coercion" has as defined by defendants, is that in intent and in fact it eliminates all class action tie-ins suits and puts one of the most widespread abuse of franchisors beyond effective redress.

6. A requirement that a plaintiff must affirmatively prove a separate and distinct element of "coercion", as defined by defendants, introduces a vague and unsettling element in tie-in actions. Is a plaintiff "coerced" when he is free not to take the second product but he thinks he must take it? Is a plaintiff "coerced" when he thinks he is free to take the second product but, in fact, has no such freedom? Additional uncertain situations are endless. Moreover, the proof required would be difficult and time consuming, especially when the "coercion" is subtle.

Thus, the decision of the Court of Appeals is contrary to the decisions of this Court, is unsound antitrust policy and threatens the effective private enforcement of the antitrust laws by both customers and competitors of the tie-in seller.

B. The Decision of the Court of Appeals Is Contrary to the Applicable Decisions of This Court Which Have Held That the Acceptance of a Burdensome Tying Arrangement in Itself Is Evidence of Sufficient Economic Power to Impose a Tie-in.

This Court has reminded us that it deals with economic realities and not mere words. It is not surprising then that this Court puts more credence in facts then it does labels. In *Times-Picayune Publishing Co., et al. v. United States, supra* at 605, this Court stated:

> "Yet 'tying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. v. United States,* 337 U. S. 293 (1949) . . . Thus '[I]n the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract [tie-in] and only his control of the supply of the tying device, whether conferred to patent monopoly or otherwise obtained, could *induce* a buyer to enter one' " (emphasis added).

Thus, this Court's common sense approach notes that the mere fact that the buyer accepts the tie-in is evidence of the seller's power to impose [i.e. coerce] the tie-in arrangement.

In *Fortner Enterprises, supra* at 504, this Court noted that when dealing with the question of the existence of market control the "proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable amount of buyers within the market." The Court then aptly noted:

> "Since in a freely competitive situation, buyers would not accept a tying arrangement obligating them to buy a tied product at a price higher than the going

market rate, this substantial price differential with respect to the tied product (prefabricated houses) *in itself* may suggest that respondents had some special economic power in the credit market." 349 U. S. at 504 (emphasis added).

In the present case, the plaintiffs produced evidence that, even though it costs from $7,000 to $22,000 more to do so, *405 out of 406* franchisees prior to November 1970 purchased the equipment package from Dunkin' Donuts and after 1970, *all* franchisees purchased the equipment package from Dunkin' Donuts (A102). This indeed is compelling evidence that this was not a "freely competitive situation" but that the defendants had "some special economic power" to "induce" this result. In Turner, *The Validity of Tying Arrangements Under the Anti-Trust Laws,* 72 Harv. L. R. 50, 62 (1958), the author [13] states:

> "If in a described category of cases the tie-in serves no useful function, or if any useful functions can be fulfilled in a large majority of instances by less restrictive devices, it is a reasonable assumption that the *purpose* of the seller in using a tie-in is to restrain competition in the tied product and that he has the *power* over the tying product which his purpose implies he has." (emphasis added).

The decision of the Court of Appeals that the acceptance of the burdensome tie by a substantial number of purchasers can never establish a *prima facie* case is thus contrary to the clear language of opinions of this Court and flies in the face of common sense.

13. From 1965-1968 the author, Professor Donald F. Turner of Harvard Law School, was the Assistant Attorney General in charge of the Antitrust Division of the U. S. Department of Justice.

C. The Effect of the Appellate Court's Decision Is a Complete Emasculation of the Purpose Behind Rule 23 and Represents a Clear Prohibition for Franchisees to Bring Class Action Antitrust Suits Against Their Franchisors Thus Inhibiting Private Enforcement of the Antitrust Laws.

While the Court of Appeals recognized the imbalance of power between a franchisor and its franchisees ("The franchise system in this country today is not free from problems. Most, if not all, of these arise from the disparity in power and sophistication between franchisor and franchisee.") (A200), it completely failed to recognize the purpose and the effect this decision will have on class action antitrust litigation in the franchising industry. In effect, this decision will act as a "death knell" for all franchise tie-in class actions where the complained of practices are not written in the franchise documents. The Court of Appeals has, in effect, held that a franchisor who after *Siegel v. Chicken Delight, Inc.,* 271 F. Supp. 722 (N. D. Cal. 1967), modified *sub nom., Chicken Delight, Inc. v. Harris,* 412 F. 2d 830 (9th Cir. 1969), has eliminated all of the anticompetitive tie-in language from the franchise documents, will not be subject to class action certification, even though the franchisor still retains the tie-in policy. This represents not only a complete emasculation of Rule 23 of F. R. Civ. P., but more importantly, it insulates any franchisor who practices illegal tie-ins which are not set forth in the franchise agreements from antitrust class actions. The decision by the Court of Appeals will act as an effective deterrent to private enforcement of the antitrust laws. This is completely contrary to this Court's prior decisions.

The general necessity for class action treatment of related claims is emphatically demonstrated when the

underlying cause of action seeks redress for violations of the antitrust laws, since vigorous private enforcement of the antitrust laws has repeatedly been recognized as providing a necessary supplement to suits brought by the United States. In *Perma Life Mufflers, Inc. v. International Parts Co.*, 392 U. S. 134, 139 (1968), for example, the Court characterized private suits as "a bulwark of antitrust enforcement" and refused to recognize a defense of *in pari delicto* as a bar to such a suit, since "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to anyone contemplating business behavior in violation of the antitrust laws." [14]

Recently in *Alyeska Pipeline Service Co. v. Wilderness Society*, – U. S. –, 95 S. Ct. 1612, 1624 (1975), the Court reiterated its long standing policy behind private enforcement of the antitrust laws when it commented:

> ". . . Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. Fee-shifting in connection with treble damage awards under the antitrust laws is a prime example. . . ."

In *Hawaii v. Standard Oil Company of California*, 405 U. S. 251, 262, 266 (1972), the Court reaffirmed the encouragement of private plaintiffs enforcing the antitrust laws as "'private attorneys general.'" 405 U. S. at 262. The Court further recognized the important role which Rule 23 plays in private enforcement:

14. See also *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U. S. 311, 381-19 (1965); *Radovich v. National Football League*, 352 U. S. 445, 453-54 (1957); *Emich Motors Corp. v. General Motors Corp.*, 340 U. S. 558, 567-68 (1951); *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 751-52 (1947). *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481 (1968); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U. S. 321, 336 (1971).

> ". . . Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." 405 U. S. at 266.

See also *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211 (1950).

Furthermore, in *Mills v. Electric Auto-Lite Company* 396 U. S. 385, 396 (1970), a class action case which involved, *inter alia*, a violation of § 14(a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78(a), the Court recognized the importance of securities class actions which have equal force when applied to antitrust class actions: ". . . private stockholders [consumers] actions of this sort [class actions] involve corporate therapeutics' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy [antitrust] statute." See also the Court's recent opinion in *Goldfarb v. Virginia State Bar*, – U. S. –, 95 S. Ct. 2004 (1975), where the Court indicated that an antitrust price-fixing class action was appropriate. Because of this significant function performed by treble damage plaintiffs in enforcing federal regulatory policies by class action, ". . . the interests of justice require that in a doubtful case . . . an error, if there be one, should be committed in favor of allowing the class action." *Kahen v. Rosenstiel*, 424 F. 2d 161, 169 (3d Cir. 1970); *cert. den., sub nom. Glen Alden Corp. v. Kahan*, 398 U. S. 950 (1970); *Esplin v. Hirschi*, 402 F. 2d 94, 101 (10th Cir. 1968), *cert. den.* 394 U. S. 928 (1968).

In light of this Court's pronouncements that private enforcement of the antitrust laws is paramount in maintaining competition, it is inconsistent at best that the Court of Appeals focused its concern that competition in the marketplace was not the key issue, but: ". . . the danger

posed is not to antitrust plaintiffs, it is to antitrust defendants." (A199). The thrust of the Court of Appeals' decision is clearly contrary to the underlying foundation of the Sherman Act.

Moreover, the Advisory Committee on the F. R. Civ. P. recognized that Rule 23 was particularly applicable in antitrust tying situations:

> ". . . a patentee of a machine charged with selling or licensing the machine on *condition* that purchasers or licensees also purchase or obtain licensees to use an ancillary unpatented machine could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test, the legality of the 'tying' condition." (emphasis added). Notes of Advisory Committee on Rules, 28 *U. S. C. A. Federal Rules of Civil Procedure, Rules 17 to 23.2*, p. 299.

The practical effect of the Court of Appeals' decision is that it does threaten private enforcement of the antitrust laws because of the imbalance of power between the franchisee and the franchisor. Few are the franchisees who are willing or able to do battle against ". . . the great corporation that is his supplier, his banker and his landlord." *F. T. C. v. Texaco, Inc.*, 343 U. S. 223, 227 (1968). The equalizing effect that is given to the franchisees in a class action is apparent: it enables the franchisees who have common predominating issues of fact or law to present a united, concerted and effective front against those anticompetitive practices that have been excluded by the franchisor from the franchise agreements since *Siegel, supra*.

As this Court noted in *Perma Life, supra* at 136: "Because these rulings by the Court of Appeals *seemed* to threaten the effectiveness of the private action as a vital

means for enforcing the antitrust policy of the United States we granted certiorari." (emphasis added). The argument is equally applicable in the case *sub judice*.

With this decision, every franchisor in the country who has removed the anticompetitive practices from the contracts, but who still has a firm resolute anticompetitive policy to condition tying arrangements is now insulated from a tie-in class action litigation. This is completely contrary to the purpose and effect of Rule 23 and the Sherman Antitrust Act. Judge Decker, in the well known case of *State of Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484, 493-94 (N. D. Ill. 1969), recognized the importance of the class action device in implementing the Congressional policy behind the antitrust laws:

> "Upholding the national class action will facilitate private antitrust litigation and will discourage future conspiracy violations."

Mr. Justice Douglas in the important antitrust class action decision of *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156, (1974), in which he concurred in part and dissented in part, along with Mr. Justice Brennan and Mr. Justice Marshall, quoted from an article by Judge Weinstein of the Eastern District of New York which appeared in the *New York Law Journal* of May 2, 1972 where Judge Weinstein aptly concluded:

> "'Where, however, public authorities are remiss in performance of this responsibility for reason of inadequate legal authority, excessive workloads or simple indifference, class actions may provide a necessary temporary measure until desirable corrections have occurred. The existence of class action litigation may also play a substantial role in bringing about more efficient administrative enforcement and in inducing legislative action.

'The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations and investors who are victimized by insider trading or misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public.

'When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct.'" 417 U. S. at 186.

Clearly, to allow what the Court in *Northern Pacific, supra* at 5, has stated is one of the "pernicious" practices to go unfettered, is in direct conflict with the dictates of Rule 23, prior Supreme Court decisions and the general policy behind antitrust enforcement.

D. The Decision by the Court Below Raises Significant Economic Issues Which Transcend the Entire Franchise Industry Warranting Review by This Court.

The importance of the Court of Appeal's decision goes far beyond the mere resolution of the class action issue. This landmark franchising decision will have an effect on sales made by franchisors to franchisees which totalled over \$3.6 Billion in 1973 (excluding sales made by franchisors to automobile and truck dealers, gasoline service stations and soft drink bottlers).[15] The class decisions in the instant case, both at the Court of Appeals and District Court level, have been the subject of great publicity both in the business and legal communities. This much publicized case has had and will continue to have substantial and far reaching impact in an area of the antitrust law which is vital to the franchising industry. Its importance is underscored by the fact that the issue of coercion, whether it be in a contract or not in a contract, has been and will continue to be raised numerous cases, with confusing and conflicting results.[16] See *Siegel, supra; Hawkins v. Holiday Inns, Inc.*, 1975 Trade Cases ¶ 60,153 (W. D. Tenn. 1975); *Herrman v. Atlantic Richfield Co.*, 65 F. R. D. 585 (W. D. Pa. 1974); *Sommers v. Abraham Lincoln Federal Savings and Loan Assoc.*, 1975 Trade Cases ¶ 60,280 (E. D. Pa. 1975); *Aamco Automatic Transmissions v. Tayloe*, 1976 Trade Cases ¶ 60,666 (E. D. Pa. 1976) and *Fall Church Bratwursthaus v. Bratwursthaus Management Corp.*, 354 F. Supp. 1237 (E. D. Va. 1973) and *In Re Clark Oil and Refining Corp.*, 1974-1 Trade Cases ¶ 74,880 (E. D. Wis. 1974) compared to *Bogosian v. Gulf Oil Corp., et al.*, 62 F. R. D. 124 (E. D. Pa. 1973), on appeal; *Plekowski v. Ralston Purina Co.*, 1975-2 Trade Cases ¶ 60,411 (M. D. Ga. 1975); *DiCostanzo v. Chrysler Corp.*, 57 F. R. D. 495 (E. D. Pa. 1972); *Abercrombie v. Lums, Inc.*, 345 F. Supp. 387 (S. D. Fla. 1972) and *Smith v. Denny's Restaurants, Inc.*, 62 F. R. D. 459 (N. D. Cal. 1974).

Not only will an early and definitive ruling by this Court lay to rest and prevent the spawning of new litiga-

15. U. S. Department of Commerce, Franchising In The Economy 1973-75, at 24 (G. P. O. 1975).

16. Of course, the decision of the Court of Appeals is not limited to the franchise industry, it affects all tie-in cases in the business community.

tion involving this important area of the antitrust law, but by issuing the Writ of Certiorari, guidance to the franchise business community will be given so that the franchisee and his franchisor will be able to deal with each other under an atmosphere of understanding with respect to tie-ins. Petitioners submit that it is imperative that this Court review the decision of the Court below in view of the importance to the general economy of clear and correct guidelines for the proper standard to be applied in the important area of illegal tie-ins.

CONCLUSION.

In considering whether to issue the Writ of Certiorari, it is important to keep in mind the purpose for which the Sherman Act was brought into being. This Court in *United States v. Topco Associates*, 405 U. S. 596, 610 (1972) recognized that the antitrust laws are a fundamental statement of American economic policy when it stated:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Charta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."

If the Court of Appeals is correct in requiring affirmative proof of "coercion" as a separate element of a tying violation, then the use of Rule 23 as a deterrent to an antitrust offender in a tying situation is for all practical purposes ended. If violations so well established by testimony and documents as evidenced by the District Court's findings (A96-119) cannot form the basis for the maintenance of a class action, then the antitrust laws themselves have become the exclusive province of the executive branch or the private litigant whose financial interests are so substantial that litigation is an available tool for winning relief. Unless the federal judiciary remains available to the franchisees or the consumers on a class basis to enforce the antitrust laws, there is precious little to deter future violators from tampering with the competitive market.

For all the foregoing reasons, petitioners respectfully submit that this petition should be granted and a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

David Berger,
Warren D. Mulloy,
Warren Rubin,
David Berger, P. A.,
1622 Locust Street,
Philadelphia, Pa. 19103
(215) 732-8000

and

James M. Marsh,
Edward C. German,
Joseph G. Manta,
LaBrum & Doak,
1500 Seven Penn Center,
Philadelphia, Pa. 19103
(215) 561-4400

and

Harold Brown,
Brown, Leighton & Cohen,
66 Long Wharf,
Boston, Mass. 02110
(617) 227-9265
Counsel for Petitioners.